ZULKIFLI AYOB

v.

VELASINI K MADHAVAN & ANOR

HIGH COURT MALAYA, KUALA TERENGGANU
ABDUL KADIR SULAIMAN J
[CIVIL APPEAL NO: 12-22-96]
13 NOVEMBER 1999

DAMAGES: *Fatal accident - Dependency claim - Loss of support - Support for adopted child - Whether to be excluded - Multiplier - Whether assessment based on higher number of years' purchase - Pre-trial loss of support - Whether amount arrived at for pre-trial loss should be deducted from global figure representing total loss of support - Failure to deduct - Whether quantum improperly assessed - Civil Law Act 1956, s. 7*

The first respondent's husband ('the deceased') died when the car he was travelling in collided with the car driven by the appellant. The deceased was 36 years old at the material time. Following the deceased's death, the first respondent brought a dependency claim against the appellant pursuant to s. 7 of the Civil Law Act 1956 ('the Act'). Before the learned Sessions Judge, the first respondent gave evidence, inter alia, that the deceased used to give her RM2,000 a month, out of which she spent RM1,550 for expenses such as food, clothings, house rental, electricity and telephone bills and for the support of the deceased's father who was past 55 years old. Evidence was also adduced that during the lifetime of the deceased, the family had a one year old adopted daughter living with them. These apart, the respondent also testified that she had spent all the RM2,000 per month given her by the deceased. The respondent, however, could not explain as to how she spent the balance of RM450 per month.

Based on the evidence, the learned Sessions Judge fixed the loss of dependency at RM1,500 per month and the years of purchase at 15 years. In the circumstances, upon the facts, the learned judge inter alia awarded the first respondent RM270,000 for loss of dependency, calculated on the formula of RM1,500 x 12 x 15 years ('item (a)'). The facts also showed that a period of 141 months had lapsed between the date of death and the disposal of the suit, and that being so, the learned judge awarded RM211,500 for pre-trial loss of support after multiplying the number of days with the monthly loss of dependency of RM1,500 ('item (b)').

The appellant appealed and argued that the amount awarded was excessive for reasons that the learned Sessions Judge: (i) had based the assessment on a higher number of years' purchase; (ii) had failed to deduct from item (a) the period of pre-trial loss of support amounting to 141 months which is the subject matter of item (b).

Held:

[1] The dependants, for the purpose of s. 7 of the Act, are the wife, husband, parent and child of the deceased. An adopted child cannot therefore be a dependant unless the child is a legally adopted child. There was no evidence herein that the adopted child was a legally adopted child of the deceased, and that being so, a sum of RM200 per month spent on the child ought to be deducted from the RM2,000 expended by the deceased towards her maintenance, leaving only a sum of RM1,800 per month to be reckoned with.

[2] Since the first respondent could not account for the balance RM450, that sum could not go towards the support of the dependants for which the appellant tortfeasor is to be held responsible to provide by way of damages. Therefore, only a sum of RM1,350 could be accounted for as being the support given by the deceased to his dependants.

[2a] The figure RM1,350, however, did not truly represent the actual loss of support to the dependants. This is because that amount included also the amount expended by the deceased on himself by way of his contribution towards the house rental, the electricity, water and telephone bills, food and clothings. By his death, his contribution to himself would have ceased.

[3] In the circumstances, a figure of RM1,250 per month is reasonable in determining the loss of support to the wife and the father of the deceased on account his death.

[4] Taking into account the retiring age of 55 years, and that six years ought to be deducted for contingencies, the number of years' purchase ought to be varied to 13 years. It follows that the total amount for loss of support would be RM195,000, based on the formula RM1,250 per month x 12 months x 13 years. This global figure, however, should be distributed between the future loss of support and the pre-trial loss.

[5] It is common ground that the pre-trial period was 141 months. In the circumstances, that amount arrived at for loss of support should be deducted from the global figure, because item (a) and item (b) represent the total loss of support from the date of death of the deceased due to the dependants under s. 7 of the Civil law Act 1956. This has not been done by the learned judge below.

[5a] Consequently, the true figure for item (a), being future loss of support, should be RM18,750 only being for a period of 15 months (ie 13 years minus 141 months pre-trial period) instead of RM270,000. For item (b), being the pre-trial loss, RM176,250 should be awarded instead of RM211,500, on the basis of RM1,250 per month x 141 months.

[Appeal allowed; order accordingly.]

Case(s) referred to:
Ahmad Nordin Hj Maslan & Anor v. Eng Ngak Hua & Ors [1985] 2 MLJ 431 ***(refd)***
Chan Chin Ming v. Lim Yoke Eng [1994] 3 MLJ 233 ***(refd)***
Graham v. Dodds [1983] 2 All ER 953 ***(refd)***
Lee Ban Hoo & Anor v. S Veeriah & Anor [1982] 2 MLJ 188 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 7(3)(iv)(d)

For the appellant - Razlan Hadri; M/s Gan, Ho & Razlan Hadri
For the respondent - M Govindarajoo; M/s Bazari & Assoc

Reported by WA Sharif

JUDGMENT

Abdul Kadir Sulaiman J:

In the court below, the appellant was the defendant in a negligence suit brought by the respondents/plaintiffs against him. The first respondent's claim was brought pursuant to s. 7 of the Civil Law Act 1956 for the benefit of the dependants of the deceased, Mathavan a/l Kunjapoo. The car driven by the second respondent with the deceased as a passenger, was involved in a road collision with the car driven by the appellant resulting in the injuries to the respondents and the passenger succumbed to his injuries and died later in the hospital. By an order of 12 June 1996, the learned Sessions Judge after the hearing of the suit gave judgment against the appellant and made the following awards in favour of the first respondent in respect of the dependency claim, *inter alia*:

(a)	Loss of support	RM270,000
(b)	Pre-trial loss of support	RM211,500
(c)	Funeral expenses	RM 3,000
(d)	Interest at the rate of 4% p.a. in respect of item (b)	RM 8,460
	Total	RM492,960

The appellant being dissatisfied with the quantum awarded, filed an appeal on 22 June 1996. The first respondent, however, did not appeal against the decision. At the hearing of the appeal, the appellant limited his appeal only to the quantum awarded in respect of items (a) and (b) above. It is contended for the appellant that the amount awarded was manifestly excessive for the reason that the learned judge based his assessment on a higher number of years' purchase (or some people prefer to call it a multiplier) and secondly, his failure to deduct from item (a) the period of pre-trial loss of support amounting to 141 months which is the subject matter of item (b).

At the time of his death the deceased was 36 years old. He was an independent contractor working with Petronas earning a monthly income of about RM3,000. This accident happened on 10 August 1984 which was before the incorporation of s. 7(3)(iv)(d) to the Civil Law Act 1956 effective from 1 October 1984 providing for a statutorily-fixed number of years' purchase.

According to the evidence of the widow of the deceased, they had an adopted one year old daughter, Yogeethe d/o Vretheran, living with them during the lifetime of the deceased. Out of the deceased's monthly income the husband gave her a sum of RM2,000 per month to be disbursed for their household expenses and for the maintenance of his dependants. With that amount of money she paid RM150 per month towards their house rental, RM50 per month for water and electricity supply, RM200 per month for telephone bill, RM500 per month for the household food and drink, RM150 per month for clothings, RM200 per months towards the maintenance of their adopted daughter, and RM300 for the father of the deceased who was past 55 years old and was not staying with them, giving a total expenditure of RM1550 per month in all. She further testified that she spent all the RM2,000 per month given to her by the deceased without anything left for saving. However, she did not explain in what manner and for what purpose she spent the balance of RM450 per month. The father did not give any evidence in the trial.

Based on the evidence, the learned judge decided that the loss of dependency was at RM1,500 per month. As the deceased died at the age of 36 years, the number of years' purchase was decided to be 15 years. In the circumstances, the loss of dependency is RM270,000 based on the formula of RM1,500 per month x 12 months x 15 years. No reason at all was given by the learned judge as to how he arrived at RM1,500 per month as the monthly loss of dependency and as to how he arrived at the figure of 15 years as the multiplier.

From the date of death to the date of the disposal of the suit a period of 141 months has lapsed. So, the learned judge multiplied that number of days with the monthly loss of dependency of RM1,500 giving a figure of RM211,500 as stipulated in item (b) without explaining as to why this number of days prior to the trial was not deducted from the calculation in item (a).

Being a dependency claim under s. 7 of the Civil Law Act 1956, the dependants for the purpose of the section are the wife, husband, parent and child of the deceased. An adopted child cannot be a dependant unless the child is a legally adopted child as otherwise a number of them could be brought in into the family and thereby becoming dependants of the deceased incurring a liability on a tortfeasor in assessing damages in respect of a dependency claim. In this particular instance, there was no evidence led that Yogeethe d/o Vretheran, the adopted child of the family was a legally adopted child of the deceased. For that reason, the sum of RM200 per month spent on the child ought to be deducted from the RM2,000 expended by the deceased towards her maintenance leaving only the sum of RM1,800 per month to be reckoned with. In *Chan Chin Ming v. Lim Yoke Eng* [1994] 3 MLJ 233, Peh Swee Chin SCJ said this at p. 240:

> Further, in our opinion, loss of support is for all practical purposes translated into financial loss sustained by a dependent. Having regard to the class of persons entitled as stated above, it is a logical conclusion to say that a plaintiff can only claim in such a case for financial loss which he sustains as a dependant and not in any other way.

Now, out of this balance of RM1,800, a total sum of RM1350, according to the evidence of the widow, went towards the expenses of house rental, water, electricity and telephone bills, food, clothings and for the father of the deceased. Thereby leaving a further balance of RM450. This amount of money could not be accounted for by the wife apart from saying that she spent all the RM2,000 per month given to her leaving behind no savings. It could not, therefore, be said that this balance of RM450 went towards the support of the dependants for which the appellant tortfeasor to be held responsible to provide by way of damages. Therefore, up to that point only a sum of

RM1,350 could be accounted for as being the support given by the deceased to his dependants. But does that truly represent the actual loss of support to the dependants on account of the death of the deceased? I do not think so, because that amount included also the amount expended by the deceased on himself by way of his contribution towards the house rental, the electricity, water and telephone bills, food and clothings. By his death, this contribution to himself would have ceased. The Supreme Court in *Ahmad Nordin bin Haji Maslan & Anor v. Eng Ngak Hua & Ors* [1985] 2 MLJ 431 held that the amount of loss of support to the dependant of the deceased should exclude the expenses of the deceased in the household during his lifetime. See the dicta at p. 435. Can then the amount of actual loss of support be easily quantified so as to provide a true monthly figure as representing the actual loss of support to the dependant wife and the father of the deceased in the present case? Even up to this point the figure arrived at by the learned judge as being RM1,500 per month as against the sum of RM1,350 being the loss of support cannot be sustained, leave alone providing no reason for coming to that conclusion.

However, in his submission, the learned counsel for the appellant was quite contented with the figure of RM1,250 per month as being a reasonable amount of loss of support to the dependants of the deceased. I would say the figure is reasonable in the circumstances in determining the loss of support to the wife and the father of the deceased on account of his death. A reduction of RM100 per month towards the deceased's own support is reasonable in the circumstances. I would therefore, accept the figure for purpose of calculating the loss of support.

The next issue is that of the multiplier. The learned judge in his judgment used a multiplier of 15 years. Again he failed to provide any reason for coming to that conclusion. This according to the learned counsel for the appellant is slightly on the high side. He submitted that the multiplier should be 13 years instead. He based his argument on *Ahmad Nordin, supra*. In that case the learned trial judge decided on a multiplier of 25 years in respect of the deceased who died at the age of 24 years. This was based on the probable retiring age of 65 years. The Supreme Court was of the view that the retiring age should be fixed at 55 and as the deceased was 24 at the time of his death and deducting 13 years for contingencies that would leave 18 years purchase. In the present case, the learned counsel for the appellant conceded on a conventional figure of 1/3 to be deducted for contingencies taking into account that the deceased in this case was older than the one in the case cited. Taking out this number of years which is about six years for purpose of contingencies would leave the multiplier of 13 years. I would accept this submission by the learned counsel as being reasonable and fair in the circumstances, taking the

contingencies of the wife remarrying and the father passing away. The wife was in her twenties at the material time. Therefore, the decision of the learned judge on the number of years' purchase be varied and reduced to 13 years (156 months) instead of 15.

Having determined the monthly amount of loss of support for the dependants and the number of years' purchase, the total amount would be RM195,000 based on the following formula of RM1,250 per month x 12 months x 13 years. This global figure would be distributed between the future loss of support and the pre-trial loss as itemised by the learned judge under items (a) and (b) in the impugned award respectively. Item (b) carries interest as distinct from item (a). It is common ground that the pre-trial period was 141 months. In the circumstances the amount arrived at under item (b) should be deducted from the global figure representing item (a) because items (a) and (b) represent the total loss of support from the date of death of the deceased due to the dependants under s. 7 of the Civil Law Act 1956. This has not been done by the learned judge which is clearly erroneous. In *Graham v. Dodds* [1983] 2 All ER 953, the House of Lords held that in assessing the future loss of dependency in a fatal accident claim the multiplier was to be calculated from the date of death and not the date of trial (as in a personal injury case where the injured person survived until trial), because there was no certainty what might have happened to the deceased if he had lived after the date of death, and there would otherwise be the undesirable anomaly that the dependants would recover more merely by delaying the date of trial. The multiplier was to be selected as at the date of death and the number of pre-trial years for which special damages were awarded was then to be deducted from the multiplier. This formula is being accepted by our court in *Lee Ban Hoo & Anor v. S. Veeriah & Anor* [1982] 2 MLJ 188 where a separate assessment was made for the loss of dependency from the date of death of the deceased to the date of judgment, and the loss of dependency from the date of judgment. In the circumstances, the award of the learned judge is varied to that extent. The true figure for item (a) being future loss of support should be RM18,750 only being for a period of 15 months (13 years – 141 months pre-trial period) instead of RM270,000 and for item (b) being the pre-trial loss should be RM176,250 instead of RM211,500 on the basis of RM1,250 per month x 141 months. To that extend this appeal by the appellant is allowed with costs and the award of the learned judge is varied accordingly as regards items (a) and (b) respectively.

I have considered the submission by the learned counsel for the respondents. I see no merit at all in the submissions in that instead of defending the learned judge's decision on the two types of award, he was submitting as if the respondents were the appellants in that he was questioning on the inadequacy

of the award. As I mentioned earlier, the first respondent did not appeal against the decision of the learned judge. As the amount that the first respondent ought to have received is more than the award, he urged upon the court to dismiss this appeal of the appellant. On the issue of the multiplier, the learned counsel for the first respondent urged upon the court not to disturb the finding of the learned judge as he was free to determine the number of years' purchase which he had determined at 15 years. In answer to that I would say that while it is within the discretion of the learned judge of the first instant to determine the issue, this determination must be based on his judicial discretion. When a discretion is vested on any particular person, an appellate court will be slow to disturb that exercise of discretion, but when that discretion is not based on accepted legal principle such as this, the appellate court is not bound to close its eyes in the face of the wrong application of the principle in the exercise of the so called discretion. It fact, it is the duty of an appellate court to correct such wrong exercise of the discretionary power given by invoking its own discretion based on the correct principle to be applied. More so, in this case, the learned counsel agreed that based on the principle laid down in *Ahmad Nordin, supra* the determination that the years' purchase in the present case be 13 is correct.